UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUDLOW ESSEX PARTNERS LLC, NATHAN HALEGUA and MARTIN D. NEWMAN,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

Case No. 1:17-cv-02042-DLC

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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Defendant Wells Fargo Bank, N.A. ("Defendant" or "Wells Fargo"), submits this memorandum of law in support of its Motion to Dismiss Plaintiffs Ludlow Essex Partners LLC ("Ludlow"), Nathan Halegua ("Halegua") and Martin D. Newman's ("Newman," and collectively with Ludlow and Halegua, "Plaintiffs") complaint filed in this action on February 22, 2017 (the "Complaint") for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

INTRODUCTION

Plaintiffs – an LLC and two of its members – allege that they were induced to send a wire to a Wells Fargo account by a fraudulent email purporting to supply distribution instructions from another LLC member. Without any legal basis, Plaintiffs are attempting to blame their own carelessness on Wells Fargo, which merely opened the account in question and accepted a wire – as instructed – from Plaintiffs. Wells Fargo owes Plaintiffs – who are non-customers – no duty under New York law. Thus, based on the facts as alleged by Plaintiffs, this action should be dismissed, with prejudice.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs' claims arise out of a December 14, 2015, wire transfer in the amount of $250,000.00 (the "Wire") from Ludlow to a Wells Fargo checking account owned by non-party JGM Global Ventures Inc. ("JGM"). *See generally*, Compl. Plaintiffs contend that on or about December 1, 2015, JGM intercepted information about an intended distribution from Ludlow to David Levy, one of its members, and sent instructions that the funds for that distribution should be wired to JGM instead. *Id.* at ¶¶ 10-14. Based on these fraudulent instructions, Ludlow directed its bank to transmit the Wire, which was accepted by Wells Fargo and credited to JGM's account, as instructed. *Id.* Sometime after December 16, 2015, Plaintiffs discovered that David Levy did not receive the intended funds, and contacted Wells Fargo, which returned all of the funds remaining in the account from the Wire. *Id.* ¶¶ 36-42.

On the basis of the foregoing, Plaintiffs filed the two-count Complaint against Wells Fargo in the Supreme Court of the State of New York, County of New York, Index Number 650919/2017 (the "Action"). The Action alleged that Wells Fargo was negligent in allowing JGM to open its Wells Fargo account and that this same activity violated N.Y. General Business Law § 349. Wells Fargo was served with a copy of the summons and complaint for the Action on February 22, 2017. Doc. No. 1-1, p. 11-13. Plaintiffs and Wells Fargo stipulated to an extension of time until April 4, 2017, for Wells Fargo to respond to the Action. *Id.*, pp. 14-15. Wells Fargo removed the Action to this Court on March 21, 2017. *See* Doc. No. 1.

STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court "must take all of the factual allegations in the complaint as true." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717 (2d Cir. 2013). A complaint need not contain "detailed factual allegations," but a plaintiff must do more than present "an unadorned, the defendant unlawfully-harmed-me accusation." *Matson v. Board of Educ.*, 631 F.3d 57, 63 (2d Cir. 2011) (quotations omitted). The Second Circuit has explained that the court need not accept "legal conclusions" as true and a complaint should only survive if the well-pleaded allegations of the complaint could "plausibly give rise to an entitlement of relief." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quotations omitted).

ARGUMENT

Plaintiffs' Complaint is based on the erroneous assumption that Wells Fargo owes non-customers a duty of care to ensure that they are not harmed by email-based scams. Plaintiffs' claims fail in their entirety because of this basic lack of duty. Plaintiffs' Complaint should be dismissed, with prejudice and without leave to amend, because they can assert no facts that would entitle them to relief against Wells Fargo.

1. Plaintiffs' Fail to State a Claim for Negligence.

Plaintiffs' first cause of action (common law negligence) fails to state a claim against Wells Fargo. "To establish a *prima facie* case of negligence under New York law, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.'" *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 286 (2d Cir. 2006) (quoting *Solomon ex rel. Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985)). Although a plaintiff must establish each of these discrete elements, "[t]he threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001). In order to demonstrate this threshold element, "[t]he injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her, for '[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.'" *Id.* (quoting *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000)).

It is well-established in New York that "'[b]anks do not owe non-customers a duty to protect them from the intentional torts of their customers.'" *Lerner*, 459 F.3d at 286 (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 830 (S.D.N.Y. 2005)); *see also Winkler v. Battery Trading Inc.*, 89 A.D.3d 1016, 1018 (2d Dep't 2011) (directing entry of judgment of dismissal for all claims against bank based on bank's lack of duty to a non-customer). Indeed, this lack of duty is universally recognized throughout the country.[1] The fact that a bank has no duty to non-customers is no different if couched in a bank's allegedly improper opening of an account for a customer that has a fraudulent purpose. *See, e.g., Tzaras v. Evergreen Intern. Spot Trading, Inc.*, No. 01 Civ. 10726(LAP), 2003 WL 470611, *5-*6 (E.D.N.Y. Feb. 25, 2003) (dismissing all claims against bank, including negligence, under New York law, where defendant bank opened bank account for purportedly fraudulent investment scheme); *see also In re Agape Litig.*, 681 F. Supp. 2d 352, 359-360 (E.D.N.Y. 2010) (same)*; Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 227 (4th Cir. 2002) (bank that opened an account in the name of "Bear Sterns" owed no duty of care under North Carolina law to non-customer victim of a fraudulent investment scheme); *Weil v. First Nat'l Bank of Castle Rock*, 983 P.2d 812, 815 (Colo. App. 1999) (bank owed no general duty of care to inquire as to employees' authority to open an account in a sole proprietorship's unregistered trade name and therefore was not liable in negligence).

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[1] *See, e.g., Conder v. Union Planters Bank, N.A.*, 384 F.3d 397, 400 (7th Cir.2004) ("Tasking banks to read every check to make sure that the payee's identity was consistent with the character of the account would impose an unreasonable burden, and so the failure to perform the task would not be negligence even if banks did have a general duty of care to noncustomers (which, to repeat, they do not)."); *Old Republic Nat'l Title Ins. Co. v. Landmark Closing Co.*, No. 4:09-CV-00422, 2010 WL 2228436, at *2 (E.D. Ark. June 1, 2010) ("The general rule in Arkansas and elsewhere is that banks do not owe noncustomers a duty to exercise reasonable care."); *Guidry v. Bank of LaPlace*, 740 F. Supp. 1208, 1218-19 (E.D. La. 1990) (noting that banks owe "absolutely no duty" to third persons); *VIP Mortg. Corp. v. Bank of Am., N.A.*, 769 F. Supp. 2d 20, 26-27 (D. Mass. 2011) (refusing to carve out an exception to the "now almost universal rule that banks do not owe a common law duty of care to third-party non-customers"); *Pub. Serv. Co. of Okla. v. A Plus, Inc.*, No. CIV-10-651-D, 2011 WL 3329181, at *4-7 (W.D. Okla. Aug. 2, 2011) (agreeing with the majority of courts that "have held that a bank does not have a duty to third-party non-customers, even if the bank customer engages in misconduct harmful to the non-customer"); *Marlin v. Moody Nat'l Bank, N.A.*, No. H-04-4443, 2006 WL 2382325, at *6-7 (S.D. Tex. Aug. 16, 2006) ("Banks have no duty to non-customers."); *Radwill v. Romeo*, No. 1-11-0912, 2013 WL 1289072, at *9 (Ill. App. Mar. 29, 2013) ("Under Illinois law, a bank does not owe a common law duty of care to a non-customer."); *Ahlan Wa Sahlan Hospitality Co. v. United Citizens Bank of S. Ky., Inc.*, No. 2011-CA-001349, 2013 WL 275636, at *1-2 (Ky. App. Jan. 25, 2013) (declining to recognize any duty owed by a bank to a non-customer third party); *Ramsey v. Hancock*, 79 P.3d 423, 427 (Utah App. 2003) (banks owe no duty of care to noncustomer payees); *Volpe v. Fleet Nat'l Bank*, 710 A.2d 661, 665 (R.I. 1998) (bank owed no duty to detect that a non-customer payee's indorsement had been forged and thus was not liable in negligence to the payee); *Pa. Nat'l Turf Club, Inc. v. Bank of W. Jersey*, 158 N.J. Super. 196, 385 A.2d 932, 936 (N.J. Super. Ct. App. Div. 1978) (bank was not liable in negligence to payee for balance due on nine checks that were returned due to insufficient funds).

In short, Wells Fargo owed no duty of care to Plaintiffs, therefore they can state no claim against Wells Fargo for the loss suffered from the Wire. *See Tzaras*, 2003 WL 470611, *5-*6 (dismissing all claims against bank where the bank was responsible only for "allow[ing] the wire transfer from [the plaintiff] to [the fraudster] to be completed"); *Frankel-Ross v. Congregation OHR Hatalmud*, 15 Civ. 6566(NRB), 2016 WL 4939074, *5 (S.D.N.Y. Sept. 12, 2016) (Buchwald, U.S.D.J.) (holding that a bank owes no duty of care to a non-customer to monitor its customer's incoming wires). Therefore, Plaintiffs' negligence action should be dismissed, with prejudice, and without leave to amend.

2. Plaintiffs' Fail to State a Claim for Violation of N.Y. General Business Law § 349.

Plaintiffs' second cause of action, for violation of N.Y. General Business Law § 349 ("Section 349"), likewise fails to state a claim against Wells Fargo. In short, Plaintiffs cannot make a claim under Section 349 because they are not customers of Wells Fargo, and Wells Fargo did not make any misrepresentations to Plaintiffs that caused them actual injury.

Under New York law, Plaintiffs "must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that [they] suffered injury as a result of the deceptive act." *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000) (citations omitted). Although Section 349 does not define "material," courts of this district have stated that "a material claim is one that involves information that is important to consumers and, hence, ***likely to affect their choice of, or conduct regarding, a product***." *Bildstein* *v. MasterCard Intern., Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) (citations and quotations omitted; emphasis added); *In re Sling Media Slingbox Advertising Litig.*, 202 F. Supp. 3d 352, 360 (S.D.N.Y. 2016) (dismissing Section 349 claim for failure to allege materiality or actual injury). Only acts or practices that are "likely to ***mislead a reasonable consumer*** acting reasonably under the circumstances" are actionable under Section 349. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995) (emphasis added).

Therefore, in order to survive a motion to dismiss a claim under Section 349, Plaintiffs must show that they were consumers who were denied knowledge of a fact that would have affected their choice of bank. *Bildstein*, 329 F. Supp. 2d at 414. Moreover, Plaintiffs must show that they were actually injured by the conduct in question. *In re Sling Media Slingbox Advertising Litig.*, 202 F. Supp. 3d at 360-361. Because the wrongful conduct must be customer-oriented and the plaintiff must suffer actual injury from the conduct, it is axiomatic that the plaintiff must be a *customer of the defendant*. *See Oswego*, 85 N.Y.2d at 26.

Plaintiffs' Section 349 claim thus fails on numerous levels. First, Plaintiffs are not customers of Wells Fargo – Ludlow wired money to a Wells Fargo account owned by JGM. Second, even if Plaintiffs had been customers of Wells Fargo, they have not connected misrepresentations by Wells Fargo to their choices – rather it was JGM's misrepresentation that caused Ludlow to send the Wire to JGM's account. Third, even if the Court presumed that allegedly opening unauthorized accounts constitutes a material misrepresentation by Wells Fargo, Plaintiffs cannot show that this caused an injury to them, since no such account was opened in any of their names. As such, the Section 349 claim must be dismissed.

Because these issues cannot be resolved by Plaintiffs re-pleading their allegations, the Section 349 cause of action should also be dismissed, with prejudice and without leave to amend.

CONCLUSION

Because the Complaint is completely deficient and Plaintiffs cannot state a claim against Wells Fargo, the Complaint should be dismissed, with prejudice and without leave to amend.

Dated: April 4, 2017

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By: *s/Noreen A. Kelly*

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I HEREBY CERTIFY that on April 4, 2017, a copy of the foregoing Memorandum in Support of Defendant's Motion to Dismiss was filed and served on counsel of record through the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: April 4, 2017

s/ Noreen Kelly
Noreen Kelly

Counsel for Defendant